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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/055,513	01/23/2002	Anthony Brennan	1442026	9358
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HESLIN ROTHENBERG FARLEY & MESITI PC 5 COLUMBIA CIRCLE ALBANY, NY 12203				
EXAMINER FETSUGA, ROBERT M				
ART UNIT		PAPER NUMBER		
3751				

DATE MAILED: 12/31/2003

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Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/055,513

Applicant(s)

BRENNAN ET AL.

Examiner

Robert M. Fetsuga

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 19 November 2003.
- 2a) ☒ This action is FINAL. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-41 is/are pending in the application.
- 4a) Of the above claim(s) 19, 20, 22, 33 and 37-39 is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☐ Claim(s) 1-18, 21, 23-32, 34-36, 40 and 41 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. §§ 119 and 120

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
* See the attached detailed Office action for a list of the certified copies not received.
- 13) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application) since a specific reference was included in the first sentence of the specification or in an Application Data Sheet. 37 CFR 1.78.
a) ☐ The translation of the foreign language provisional application has been received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121 since a specific reference was included in the first sentence of the specification or in an Application Data Sheet. 37 CFR 1.78.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) _____
- 4) ☐ Interview Summary (PTO-413) Paper No(s). _____
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: _____

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1. During a telephone conversation with Victor A. Cardona on December 22, 2003 a provisional election was made without traverse to prosecute the invention elected and prosecuted by applicant's in the parent application, namely the invention of Species I, claims 1-18, 21, 23-32, 34-36, 40 and 41.

Affirmation of this election must be made by applicant's in replying to this Office action. Claims 19, 20, 22, 33 and 37-39 are withdrawn from further consideration by the examiner, 37 CFR 1.142(b), as being drawn to a non-elected invention.

2. Applicant argues at pages 12-13 of the response filed November 19, 2003 the instant application complies with 37 CFR 1.75(d)(1) and MPEP § 608.01(o). Therefore, the examiner will not pursue this objection further.

3. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless -

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior

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art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

4. Claims 1-10, 16-18, 21, 23 and 28-32 are rejected under 35 U.S.C. 102(b) as being anticipated by Martin '260.

The Martin '260 (Martin) reference (Figs. 11-15) discloses a system comprising: a body 97 including a water inlet (at 107), an air inlet (at 105) and means for providing a plurality of jets 102,103; a water chamber 98,99; and an air chamber 100,101, as claimed. The broad functional language added to claims 1 and 28 reciting the body as being "stationary relative to said wall" does not distinguish the Martin disclosure. On one hand, the body 97 of Martin is stationary even during operation of the system, and on the other hand, the entire system is stationary when fluid motor 114 is not operating.

Applicant's argue at pages 14-15 of the response Martin discloses a movable injector unit. The examiner agrees. Applicant's further argue at pages 14-15 of the response Martin does not disclose a stationary body. The examiner can not agree as discussed supra. Applicant's argue at pages 15-16 of the response the functional language "configured to be attached" is not improper. The examiner agrees, however, the noted broad functional language is indeed met by the structure of the Martin

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system as previously advanced by the examiner and apparently acknowledged by applicant's.

5. Claims 1-10, 16-18, 21, 23-32, 34-36, 40 and 41 are rejected under 35 U.S.C. 103(a) as being unpatentable over Martin and Gardenier et al.

The Martin system is used in a hydrotherapy tub 93 (Fig. 8).

Re claims 24, 34 and 40, although the Martin system does not include an opening through a tub wall, as claimed, attention is directed to the Gardenier et al. (Gardenier) reference which discloses an analogous system which further includes an opening through a tub wall 11. Therefore, in consideration of Gardenier, it would have been obvious to one of ordinary skill in the art to associate an opening with the Martin tub wall in order to provide a more permanent system. It is noted Martin contemplates a permanent system in the bridging sentence of pages 4 and 5.

Applicant's argue at pages 16-17 of the response it is only through "impermissible hindsight reasoning" that Martin and Gardenier have been combined. The examiner can not agree. Since Gardenier explicitly teaches the desirability of providing a permanent type of hydrotherapy system (pgs. 1-2), one skilled in the art would consider such disclosure when implementing the

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Martin system. Thus, a prima facie case of obviousness has been established based upon a showing of facts. Furthermore, merely routing the water and air supply lines through the opening in the tub wall, as taught by Gardenier, would not appear to materially affect the movement of the injector unit.

6. Claims 11-15 are rejected under 35 U.S.C. 103(a) as being unpatentable over Martin as applied to claims 1 and 28 above, and further in view of Guiler.

Although the water chamber of the Martin fluid flow system does not include conical structures, as claimed, attention is directed to the Guiler reference which discloses an analogous fluid flow system which further includes a water chamber 13 having a conical structure 18. Therefore, in consideration of Guiler, it would have been obvious to one of ordinary skill in the art to associate conical structures with the Martin fluid flow system in order to increase water flow velocity.

Applicant's have acquiesced this grounds of rejection.

7. Claims 11-15 are rejected under 35 U.S.C. 103(a) as being unpatentable over Martin and Gardenier as applied to claims 24, 34 and 40 above, and further in view of Guiler.

To associate conical structures with the Martin fluid flow system would have been obvious to one of ordinary skill in the

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art in consideration of Guiler analogous to the discussion supra.

Applicant's have acquiesced this grounds of rejection.

8. Applicant's remarks have been fully considered and have been previously addressed.

9. All claims are drawn to the same invention claimed in the application prior to the entry of the submission under 37 CFR 1.114 and could have been finally rejected on the grounds and art of record in the next Office action if they had been entered in the application prior to entry under 37 CFR 1.114.

Accordingly, **THIS ACTION IS MADE FINAL** even though it is a first action after the filing of a request for continued examination and the submission under 37 CFR 1.114. See MPEP § 706.07(b). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated

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from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

10. Any inquiry concerning this communication should be directed to Robert M. Fetsuga at telephone number 703/308-1506 who can be most easily reached Monday through Thursday.

A handwritten signature in black ink, appearing to read 'Robert M. Fetsuga', with a stylized flourish at the end.

Robert M. Fetsuga
Primary Examiner
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